Volume 67

NO. 65-86

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WOODSTOCK TOWER FINANCE CORPORATION, Plaintiff-Appellant, vs. JOHN J. WILSON, SR. and MARIE H. WILSON, Defendant-Appellees.	Appeal from the Circuit Court of McHenry County.

ABRAHAMSON, P.J.

This appeal is prosecuted from an order dated May 28, 1965 of the Circuit Court of McHenry County for a conditional judgment against the First National Bank of Woodstock, as garnishee, and denying appellant's motion to dismiss the garnishment. The road to this order was a long and arduous one, but must be retraced for the sake of clarity.

Woodstock Tower Finance Corp., appellant, (hereinafter called the Finance Corp.) obtained judgment by confession against John J. and Marie H. Wilson (hereinafter called the Wilsons) on November 14, 1963 in the amount of $840.53, based on a note that they had executed on July 26, 1961. An Answer was filed by the Wilsons on December 13, 1963, alleging that they had been duly discharged as bankrupts on October 21,

by order of the United States District Court, Northern District of Illinois, Eastern Division, and that their obligation to the Finance Corp. had been duly scheduled and that they were, therefore, discharged from that obligation.

On December 20, 1963, an agreed order was entered that provided "that the judgment by confession be and the same is hereby opened up". At the same time, the Finance Corp. filed a Reply to Wilsons' Answer, alleging that the bankruptcy discharge of the Wilsons did not release the obligation due the Finance Corp. since it had been incurred through fraud. Exhibits were attached to the Reply showing that the Wilsons had listed only three creditors on their loan application dated July 26, 1963 whereas their bankruptcy petitions disclosed that on that date they had at least 23 different creditors.

On April 3, 1964 a Motion for Summary Judgment by the Wilsons was denied and they were given 20 days to answer the Reply. After several agreed delays, the Wilsons did, on May 6, 1964 file their Answer to the Finance Corp.'s Reply and a Counter-claim alleging that the other creditors had not been listed on the loan application on the specific directions of the Finance Corp. and asking for damages in the amount of $427.00. Copies of the Answer and Counter-claim were duly served on attorneys for the Finance Corp.

On October 2, 1964 default judgment was entered in Wilsons' favor on their counter-claim pursuant to motion with proper notice apparently given to all parties. The judgment order stated "that plaintiffs complaint and reply are and the same, shall be stricken. . ." Motions to vacate that default judgment were denied by orders of court dated November 20, 1964 and February 5, 1965 and an appeal from those orders

dismissed by this court on April 29, 1965.

In the meantime, garnishment proceedings had been instituted by Watsons on December 17, 1964, against the First National Bank of Woodstock and it subsequently was established by amended answers to interrogatories filed May 14, 1965, that on the date the Bank was served with summons funds were on deposit to the credit of the Finance Corp. Accordingly, conditional judgment was entered against the Bank on May 28, 1965, and a motion to dismiss the garnishment denied.

The Finance Corp. here contends that the trial court erred in not setting off the judgment of October 2, 1964, against their original judgment of November 14, 1963, and dismissing the garnishment. They urge that the original judgment was never vacated, but merely "opened up" to permit the matter to be heard on the merits. Certainly, the order of December 20, 1963, did not expressly vacate the judgment by confession, but merely provided, as we have seen, that it was "opened up". It is also true that the statutes provide that where a judgment by confession is opened that the judgment itself stands as security and all further proceedings thereon are stayed until further order of the court. Illinois Revised Statutes, Chapter 110, Section 101.23 (Supreme Court Rule 23).

However, this is not to say that the original judgment continued to stand in full force and effect where the claim on which it was originally based has itself been dismissed. The judgment order of October 2, 1964, included a dismissal of the Finance Corp.'s original complaint and reply. Under these circumstances, we conclude that the judgment originally rendered on that complaint is not available for purposes of set-off even though it was never expressly vacated.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 10652 Agenda No. 7

Marion J. Katauskas, Plaintiff-Appellee vs. Alex Katauskas, Defendant-Appellant	)	Appeal from Circuit Court Vermilion County

TRAPP, P. J.

Defendant appeals from a decree granting a divorce upon the grounds of cruelty, awarding the custody of a minor child to the plaintiff, together with the sum of $100 per month for the support of the child, awarding certain tangible personal property to the plaintiff, with the further order that the defendant pay the sum of $1000.00 as plaintiff's attorney's fees within 30 days and that the defendant pay the sum of $15,000.00 on or before February 1, 1965, as a lump sum settlement in lieu of alimony and in full of all rights of the plaintiff to dower and homestead. The court added to the order that the lump sum settlement should be a lien against all real and personal property of the defendant,

and that if the defendant should fail to make the payment of the settlement on or before the date specified, the title to the real and personal property was decreed to be in the plaintiff exclusively, free from the rights of the defendant, and that the defendant should execute and transfer the real estate by warranty deed on or before February 5th, and should deliver the personal property to the plaintiff, and that upon failure of the defendant to execute the warranty deed and other documents necessary to complete the transfer, the Master in Chancery was directed to effect such execution.

It is the defendant's contention that the decree should be reversed in that (1) the evidence was insufficient to support the decree, and, at most, showed but slight acts of cruelty and accidental and unintentional injuries, (2) that provisions of the decree with regard to the lump settlement in lieu of alimony within a period of 60 days was inequitable and confiscatory, and that the court erred in admitting into evidence certain documents as hereinafter discussed. There is no complaint made concerning the awarding of the custody of the child or the amount of the latter's support.

The complaint alleged that defendant had committed several acts of cruelty and that for more than 2 years had enjoyed a constant state of drunkenness. The decree awards a divorce for the several acts of cruelty, but makes no

finding upon the issue of habitual drunkenness.

As has been said many times, courts of review have traditionally accorded great weight to the findings of the trial court sitting in equity and have refused to reverse or modify the court's decree unless such was clearly against the manifest weight of the evidence.

Considering the evidence as to acts of cruelty upon the several occasions pleaded, plaintiff testified that on June 2, 1963, there was an argument concerning some food and that the defendant became angry during the course of the argument and seized her in a manner which choked her and then threw her into the bedroom. It appears that in the course of this controversy a member of the police force was called. Plaintiff's mother testified that she came to the home of the parties while the police officer was still there and that on such call she saw finger marks on the neck and arm of the plaintiff. In his testimony defendant admits the argument but denies the choking or the striking of the plaintiff and contended that he simply threw out the controversial items of food.

On a day following this occasion plaintiff took the daughter and moved to the home of her mother. She testified that on October 24, 1963, defendant came to the residence of plaintiff's mother and some discussion of the return of the plaintiff to the family home ensued. She testified that

as the discussion became a dispute, defendant seized her by the neck and threw her back over a chair. Again, plaintiff's mother testified that she came to the scene to find the plaintiff and her daughter crying and hysterical. but that the defendant had gone. Her testimony was that she saw marks on plaintiff's arm. Defendant testified that to the best of his knowledge. he was not at the mother-in-law's home on such date.

Plaintiff testified that on January 19, 1964, defendant was present or came to her mother's home as she was returning; that again. the dispute turned into a struggle and that the defendant grabbed her beads with the effect of choking her. that she blew the horn of the car and struggled free to escape into the house. Plaintiff's mother testified that she heard the sounding of the horn and that her daughter ran into the house, and again, that there were marks upon her neck..

Charles Boyd, a police officer, testified that he was called to the home and that plaintiff complained of being choked, although as he stood on the porch he did not see any marks on the neck of the plaintiff, or any evidence that she had been engaged in a struggle. He testified that upon that occasion he arrested the defendant for intoxication. Defendant testified that he had gone to his mother-in-law's home in his truck to get his automobile which was then in

his wife's possession, but that he did not hit or choke the plaintiff, and that her beads were broken as she ran into the house. He admits that he was intoxicated on that occasion at about 1:30 in the morning and that the police were called. There is further evidence that upon this occasion the defendant pleaded not guilty to a charge of intoxication, posted bond and that the matter continued to pend.

It is the contention of the defendant that the evidence does not warrant a decree for divorce upon the ground of cruelty, that the testimony of plaintiff's mother showed that she was an interested party, and that, at most, there were slight acts of cruelty or the evidence showed unintentional injury. As stated in Surratt v. Surratt, 12 Ill.2d 21; 145 N. E.2d 594, where issues are litigated in a divorce proceeding, the test is whether or not the testimony is sufficiently credible, in the light of the opposing evidence, to warrant acceptance by a reasonable person. This is primarily a question for the trier of fact who observes the demeanor and manner in which the witnesses testify. There is testimony by the plaintiff that the defendant undertook, upon several occasions, to choke her, and there is testimony of other parties of the plaintiff's prompt complaint of the attempts to choke her, and there is some testimony that marks or bruises were apparent following

such attempts. There is, in addition, evidence that upon two occasions the defendant went to the home where the plaintiff was then staying and engaged in the acts at such place. We cannot say that attempts to choke a spouse are to be considered trivial acts of cruelty, nor can they be said to be unintentional. The trial court had the opportunity to observe the defendant's testimony and to judge his credibility, and we cannot say that the decree for divorce is against the manifest weight of the evidence.

The defendant argues that the award of alimony in gross in lieu of periodic payments was inequitable, citing McGaughy v. McGaughy, 410 Ill. 596; 102 N. E.2d 806. In that case, the award of one-half of the husband's real estate was held to be inequitable, where it appeared that the real estate had come to the defendant from his family with no contribution from the wife, and the court could find no special equities which justified the award. It is noted that the decree in issue does not award property of the defendant, but undertakes to secure the payment of a sum of money as alimony in gross.

From the plaintiff's evidence, the amount of alimony in gross appears to approximate one-third of the value of the defendant's assets. Upon oral argument in this court, defendant urges that the award equals the value of all property owned by the defendant. It is disclosed, however,

in the additional abstract filed by the plaintiff that defendant testified that he did not know the value of his business, the value of its assets or accounts receivable, and that he did not know its profit in the year 1962. He does contend that his annual income has been and will continue to be reduced by reason of competition in his business. As stated in Schwarz v. Schwarz, 27 Ill.2d 140; 188 N. E.2d 673, the equity or the excessiveness of the award cannot be determined by comparing the amount thereof, or its annual installments, with the annual income of the defendant. Where the award is in gross, the responsibility of the defendant to the plaintiff is terminated completely upon the payment of the award as compared with periodic payments for an indefinite period of time.

While the award of alimony payable periodically, in specified sums, is preferable in that the court retains and can make appropriate modifying orders, the Supreme Court, in Canady v. Canady, 30 Ill.2d 440 at 445; 197 N. E.2d 42, notes that the General Assembly has recognized that there are situations in which alimony in periodic installments may not fully achieve a reasonable and just result, so that it has given authority to the court to order the spouse to pay sums of money or convey property in gross as a settlement in lieu of alimony, as the court may deem equitable.

Ill. Rev. Stat., chap.40. §19. The Court, therefore, concludes that the form and amount of the alimony are primarily within the discretion of the trial court and only subject to correction by a reviewing court where the discretion is improperly exercised.

Unfortunately, the memorandum opinion of the trial court prepared in this case does not disclose the matters which he deemed to require calling for a gross sum in lieu of periodic alimony. In Canady v. Canady, 30 Ill.2d 440; 197 N. E.2d 42, the Supreme Court considered the welfare of the plaintiff and the desirability of eliminating emotional strain and conflict as calling for a final disposition of the rights of the parties and the avoidance of future disputes about the modification of the decree. The record in this case discloses that upon one occasion following the separation of the parties, the defendant withdrew $7000.00, substantially all of his account, from the bank and used more than one-half of the sum in the enjoyment of a vacation trip to Florida. This, combined with the testimony of the defendant describing his ignorance of the financial state of his business, raises some doubt as to the financial stability of the defendant and authorizes a prediction of future disputes over the payment of periodic sums, or the modification of the decree.

The defendant urges that the court is without authority to make the amount of the award of the attorney's fees a lien upon his personal property. In this the defendant is clearly supported by the opinion in Schwarz v. Schwarz, 27 Ill.2d 140: 188 N. E.2d 673, which sets out the reason for the rule. Under the evidence disclosing the amount and nature of defendant's assets, the terms of the decree requiring the payment of $16,000.00 within 60 days or otherwise ordering the sale or transfer of the assets, were harsh, and, no doubt, worked a hardship. If a supersedeas had been had while this appeal was being heard, we would be required to reverse the provisions of the decree imposing a lien upon the personal property and, perhaps, further modification of the terms of the decree would be justified. The record discloses, however, that the necessary dealings have been concluded and the required sums have been paid, so that no further rights of the parties remain to be settled. Under such circumstances, the issues as to these terms of the decree may properly be considered moot. This view insures that the parties will not again enter into dispute or litigation as to sums or amounts to be paid by one to the other.

Defendant urges error in admitting into evidence a copy of the 1962 income tax return filed by the parties, upon the ground that such could have been offered at the time

of the trial rather than upon a re-opening of the case, and further that the return did not reflect his current income. As noted in the discussion of the Schwarz case, annual income is not a controlling factor in measuring the amount of the award in gross. We believe that there was no reversible error in either admitting this exhibit or the exhibits consisting of lists of real and personal property, which were also objected to.

Defendant further urges error with regard to a schedule of hours and services of plaintiff's attorneys. This was not admitted into evidence as an exhibit, but is said to have been simply left lying in the court file. Aside from this claim of error, we find no outright contention that the sum allowed as attorneys' fees was excessive. The latest and the definitive rule as stated by the Supreme Court in Canady v. Canady, 30 Ill.2d 440; 197 N. E.2d 42, holds that there need not be a hearing upon the reasonableness of the attorney fee allowed where the court had the record showing the financial condition of the parties and the nature of the services performed. The record in this case discloses that at the time plaintiff's attorneys requested the allowance of a reasonable fee, defendant's counsel were present but they did not then request a hearing to determine the amount of a reasonable fee. We cannot say that there was a clear abuse of discretion on the part of the trial

court. Canady v. Canady, 30 Ill.2d 440 at p.446; 197 N. E.2d 42.

The decree of the Circuit Court of Vermilion County is affirmed.

AFFIRMED

SMITH and CRAVEN, JJ., concur.

49943

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
OSBORNE MERRIWETHER,
Defendant-Appellant.

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY
CRIMINAL DIVISION

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This appeal comes from a judgment entered in the Circuit Court of Cook County, Criminal Division, May 5, 1964, upon a jury verdict finding the appellant guilty of the crime of unlawful sale of narcotic drugs. The appellant was sentenced to the Illinois State Penitentiary for a term of years not less than ten years nor more than fifteen years. The appellant claims that he was not proven guilty beyond a reasonable doubt and also that certain evidence prejudicial to him was improperly admitted.

The testimony adduced at trial showed that Charles Perry was an informer for the Chicago Police Department and that on April 16, 1963 he went with police officer Joe Johnson to 39th Street and Oakwood Boulevard where they met with another police informer, Peter Foucher. The two informers, Perry and Foucher, were searched by officer Johnson and two other officers, Crigler and Jackson. The informers were found to be free of both narcotics and money.

The informers were then given money by the police. The serial numbers of the bills were recorded on a slip of paper. Perry and Foucher were then driven by the police to 35th Street and Giles Avenue where the informers left the car and proceeded on foot to 35th Street and Indiana Avenue. At this corner they met the appellant.

After a conversation, Perry and the appellant went to a nearby tavern where Perry tried to get change for a ten dollar bill. He could not get the bill changed and went, therefore, to a tobacco store where he purchased a package of cigarettes with the ten dollar bill. He then gave the cigarettes and the change from the ten dollars to the appellant.

Perry testified that he then went back to the tavern while the appellant went across the street to a building on the corner of 35th Street and Indiana Avenue. Foucher had been waiting for Perry at this tavern, and after a conversation with him, Perry went back to where the police were waiting, to report to them. He then returned to the tavern and waited with Foucher for the return of the appellant.

The appellant returned within a short time and handed Perry a package. The three men then left the tavern, the appellant going one way and the informers going the other. Upon reaching an alley, Perry handed the package he received from Merriwether to Officer Johnson. Officers Crigler and Jackson were notified and went to arrest the appellant. The package given by Perry to the police was later analyzed and shown to be narcotics. Both Perry and Foucher admitted being users of narcotics.

Officer Johnson took the stand and his testimony is in accord with that given by Perry and Foucher. In addition, he said that he and Officer Jackson went to the cigar store and recovered the ten dollar bill. Officer Johnson stated that Perry was out of his sight for about fifteen minutes, and Foucher for around 20 minutes.

Julius Ruffin was called as a witness for the appellant. He stated that he worked at the cigar store where the cigarettes were purchased with the registered money. He said that a man had walked in on the evening in question and asked for change for ten dollars. Ruffin said he gave it to him. He further testified that a short time later a police officer came into the store and asked about the money. Ruffin said he would not let the officer go into the cash register and the policeman left without the money.

The appellant took the stand in his own defense and denied being implicated in any way in the sale of narcotics. The statement of one Mary Winters was admitted into evidence. She stated that she was with the appellant at the time he was arrested.

We believe the evidence adduced by the People was sufficient to support a verdict finding him guilty of the crime of the unlawful sale of narcotics. The appellant points out that no narcotics were found in his possession, nor was there any of the registered money in his possession. He also argues that the police did not actually see him with the two informers and that they were free to choose anyone they wanted and turn him in to the police as the one who sold the narcotics. While there is some merit in what appellant says, the Supreme Court has held that the testimony of police informers can be sufficient to convict a defendant. In People v. Hines, 30 Ill. 152, 195 N.E.2d 712 (1964) a police informer went into a basement apartment to consummate the sale of narcotics. The police were in no position whatsoever to see what was going on in that apartment, the only testimony being that of the informer. The Supreme Court there held that the testimony of this informer was sufficient to permit a finding of guilty.

The appellant also claims that the testimony of the informers was insufficient since they both admitted being narcotics addicts. In People v. Hines, supra, the court was faced with that problem, but stated that the testimony of a narcotics addict could be credible enough to support a conviction for the crime of unlawful sale of narcotics.

As for the fact that the marked money was not found on the person of the appellant at the time of the arrest, it was pointed out in the Hines opinion, supra, that the circuity of the transfer of the money is of no consequence. The entire matter turns on the question of whether the jury could properly have believed the informers rather than the appellant. We cannot say the jury was wrong in believing as it did.

It is also claimed on this appeal that the ten dollar bill and the list containing the serial numbers of the money given the informers should not have been admitted. Appellant claims the admission of the ten dollar bill was error because it was not shown to have been in his possession and because the tobacco store clerk denied giving the

bill to the police. That the bill was never shown to have been in the possession of the appellant is of no consequence. People v. Hines, supra. The appellant apparently was aware that there was a danger of being found with marked or registered money in his possession. The simple tactic of having the money changed cannot be said to immunize him from conviction. The testimony of the policemen that the bill was recovered from a cigar store tends to corroborate the testimony of the informer Perry.

As to the testimony of Ruffin that he did not give the money to the police, we believe that the conflict between his testimony and that of the police is simply to be decided as an issue of credibility by the trier of fact. There is nothing inherently improbable in the testimony of the police officers concerning the recovery of the money that a jury could not give credence to it. The jury apparently found that Ruffin was not telling the truth. As to whether his testimony was prompted by fear or some other motive we need not speculate here. The admission into evidence of the ten dollar bill was not error.

The appellant claims that the admission into evidence of the list of serial numbers was error. He gives as reasons the fact that Ruffin denied giving the ten dollar bill to the police and the fact that Peter Foucher signed an alias name on the list. The admission into evidence of this list was not error. In any event, we cannot see how the appellant could have been prejudiced by the admission of the list in view of the other evidence adduced at trial.

For the above reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, J., and BURKE, J., concur.

50288

WABASH CHEMICAL CORPORATION, Plaintiff-Appellant, v. SCHOLLE CHEMICAL CORPORATION, Defendant-Appellee.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, COUNTY DEPARTMENT, LAW DIVISION.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from an order of the trial court dismissing plaintiff's complaint, which alleged that defendant breached a requirements contract.

Plaintiff filed a cause of action against defendant and in its complaint alleged that on or about September 30, 1959, plaintiff and defendant entered into a written contract dated September 4, 1959, whereby plaintiff agreed to sell and defendant agreed to buy all of defendant's requirements of sulfuric acid for a five year period, the requirements not to exceed 15,000 tons per year; that defendant at all times required sulfuric acid; that plaintiff had a plant with a sufficient capacity to supply defendant's requirements and to perform all of the terms and conditions to be performed on its part under the contract; that defendant repudiated the contract prior to the time for performance in that defendant was already bound under a written contract to take the same requirements from Blockson Chemical Company; that subsequently defendant purchased all of its requirements from Blockson Chemical Company for the five-year period at a price of $22.35 per ton f.o.b. Joliet; that defendant notified plaintiff that it would purchase no acid from plaintiff and confirmed its intention to repudiate the contract between plaintiff and defendant by ratifying the Blockson contract; and that by reason of the repudiation, plaintiff was damaged in the sum of $300,000.00, said sum being the contract price for the five-year period, less the estimated cost of performance by plaintiff.

Defendant moved to dismiss the complaint on the ground that it was unenforceable because of the inclusion of two provisions in the

alleged contract. Defendant's motion was allowed on grounds that the two provisions made the alleged contract indefinite, illusory, lacking in mutuality and unsupported by consideration.

The provisions that were under attack in the trial court were as follows:

> Prices:
>
> Sulfuric Acid Electrolyte Grade-$12.10 per net ton
>
> The prices stated herein may be adjusted by Seller as of the beginning of any calendar quarter by so notifying Buyer in writing at least fifteen (15) days prior to the effective date of such change. Failure of Buyer and Seller to agree on any proposed adjustment in price shall release Seller of its obligations hereunder and allow Buyer to purchase elsewhere the quantities required for consumption until such time as the parties hereto shall agree or until the last prevailing contract price shall be re-established hereunder by written notice from Seller to Buyer....
>
> Conditions: . . .
>
> 8. The conditions set forth on the reverse side of this sheet are specifically made a part of this contract by the Parties hereto.
>
> Failure of Seller to make any one or more deliveries hereunder (or portions thereof) when due, if occasioned by Act of God or the public enemy, fire, explosion, perils of the sea, flood, drought, war, riot, sabotage, accident, embargo, government priority, requisition or allocation or other action by any governmental authority, including any direction or order restricting or limiting the selling price of the articles specified herein or of any material produced in conjunction therewith or in connection with such articles or materials are used, which renders it impossible for Seller, in its sole discretion, to make a reasonable profit on such production or use, or any circumstances of like or different character beyond the reasonable control of the party so failing, or by interruption of or delay in transportation, shortage or failure of supply of materials or equipment, or by compliance by Seller or Buyer with any order, direction or request of the United States Government or any officer, department agency or committee thereof, or by compliance with the request of any purchaser for purposes of producing articles of or for national defense, or by labor trouble from whatever cause arising and whether or not the demands of the employees involved are reasonable and within said party's power to concede, shall not subject said party to any liability to the other and, at the option of either party, the total quantity to be delivered hereunder shall be reduced by the quantity of the delivery or deliveries (or portions thereof) so omitted. (Emphasis supplied.)

Defendant's theory of the case is that the alleged contract is void in that it is illusory, unsupported by consideration and lacking in mutuality.

Plaintiff's theory of the case is that the contract is valid in that i is founded on adequate consideration; is not rendered void by a limited right or option in the Seller to suggest a price change, with a corresponding right in the Buyer to accept the suggestion, or be relieved of its obligation and is not rendered void by a clause relieving the parties of obligations due to specified causes beyond the control of either.

Plaintiff first argues that the price adjustment clause gives plaintiff the right to propose price adjustments at the beginning of any calendar quarter, and the exercise of such a right or option is not arbitrary or unconditional and will not render the contract void. We disagree with plaintiff. Plaintiff had a right to adjust the price for the first calendar quarter and for every calendar quarter thereafter. The words "any calendar quarter" mean the first calendar quarter or any succeeding calendar quarter for the life of the contract. Plaintiff could escape from performance by giving notice to defendant and by raising the price to a level at which it knew defendant would not or could not agree. Thus, there was no fixed price binding plaintiff.

Plaintiff contends, however, that the right to adjust the price does not accrue until after the contract has run for at least three months. We disagree with plaintiff's contention. Contracts should be read and understood according to the most obvious import of the language. The words "any calendar quarter" mean just what they say - - the first calendar quarter as well as the second or the next.

Plaintiff next contends that any price adjustment would only be a proposal requiring notification to defendant and defendant's subsequent act of agreement. We disagree with plaintiff. Plaintiff's right to make an adjustment in the price presupposes a right in the Buyer either to accept or reject. Here defendant-Buyer was bound to accept at some indefinite future date any unilateral decision to restore the old price. Plaintiff inserted a provision binding defendant even

though plaintiff could escape from performance by raising its price beyond a level at which defendant would or could agree. This provision would permit defendant to purchase its requirements elsewhere, but allowed plaintiff to re-establish the last prevailing contract price by giving written notice to defendant. Thus plaintiff could make a unilateral decision to raise the price, and if defendant Buyer found it unacceptable, plaintiff would be released from its obligation, but could at any time, within the span of the alleged contract, reinstate the last prevailing price by submitting written notice to the Buyer.

Under Illinois law a contract is void for want of mutuality of obligation. See Joliet Bottling Co. v. Joliet Citizens' Brewing Co., 254 Ill. 215 (1912); Higbie v. Rust, 211 Ill. 333 (1904); Vogel v. Pekoc, 157 Ill. 339 (1895); Paul v. Rosen, 3 Ill. App.2d 423 (1st Dist. 1954); Clark v. Pearson, 53 Ill. App. 310 (2d Dist. 1893); Lipman v. Arlington Seating Co., 192 F.2d 93 (7th Cir. 1951); Taller & Cooper v. Illuminating Electric Co., 172 F.2d 625 (7th Cir. 1949); Weston Paper Mfg. Co. v. Downing Box Co., 293 Fed. 725 (7th Cir. 1923). Here plaintiff was not bound by the agreement and mutuality of obligation is missing.

The cases cited by plaintiff are inapplicable. They only stand for the proposition that requirement contracts containing a right to terminate are consistent with mutuality of obligation if the right is not exercisable by the arbitrary discretion of one of the parties. In the instant case, the right to terminate can be arbitrarily exercised by plaintiff.

Plaintiff contends, however, that it is only the bad-faith exercise of the right to propose a price increase which would void any action on its part. We disagree. The good or bad faith of plaintiff is not a relevant consideration. The issue is not whether one party acting in bad faith may avoid performance, but whether one who is not bound to perform may bind another. As the court stated in Weston Paper Mfg. Co. v. Downing Box Co., 293 F.725 (7th Cir. 1923):

> True, plaintiff may, in acting, have been governed by a desire to hold future business, or have been prompted by other laudable motives. But plaintiff could have arbitrarily changed the price each quarter, and from such arbitrary fixation defendant had no appeal. Upon the ground of uncertainty, and also for want of consideration, we conclude the agreement as drawn was unenforceable.

Furthermore, in the present case the exercise of plaintiff's power to escape does not require a bad faith act on its part. If, because of inefficiency, plaintiff encountered rising overhead and other costs in its operation, a price increase by it would not be in bad faith. Similarly, if the cost of raw materials increased substantially, a price increase based upon this factor would not be in bad faith. Furthermore, plaintiff's negligence, not bad faith, might well have caused a delay in transportation or a failure in the supply of raw materials or production equipment. In addition is the "accident" which keeps plaintiff from making a reasonable profit, in its sole discretion. These various grounds were intended to, and did, give plaintiff an absolute excuse for not performing. Plaintiff sought to make defendant an insurer of its profit margin. The premium for this insurance is the destruction of mutuality of obligation.

Plaintiff's second argument is in rebuttal to defendant's position, that by virtue of the myriad conditions in the vis major clause, excusing performance, plaintiff was not bound to perform unless it chose to do so. We agree with defendant's position. A true vis major or Act of God clause will excuse performance upon the happening of certain conditions, but these conditions must be beyond the control of the parties to be excused. Plaintiff's clause allows plaintiff alone to determine whether to perform. Such a clause may be so worded so as to negate any legal duty, leaving it wholly at the option of one party whether to render any performance whatsoever. In such a case, the other party's promises may be unenforceable for lack of sufficient consideration, the first party's promise being illusory.

Plaintiff contends that, one, a condition had to occur as a prerequisite for any action on plaintiff's part in excusing performance; two, that the condition had to cause a subsequent failure of performance on plaintiff's part; and three, that such condition had to occur without any help from the parties.

We agree with plaintiff that a condition had to occur, and that the condition had to cause a subsequent failure of performance on plaintiff's part. The clause under consideration, however, places the determination of whether or not plaintiff should perform solely in the discretion of plaintiff. True, plaintiff need not have any control over the happening of the condition, but plaintiff had the choice to perform or not perform as it saw fit by determining when an excusable condition had arisen.

Plaintiff's argument, that the existence of good faith on plaintiff's part, while choosing what was an excusable condition, is without merit in that good faith deals with the performance of the contract, while in the instant case, we are determining whether there is mutuality of obligation and whether or not a contract exists. For the above reason, we find that performance by plaintiff was illusory, that there was a lack of consideration for defendant's promise, and that mutuality of obligation was lacking. Thus the contract is void. The judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and BURKE, J., concur.

A

50608

JAMES DAVIS and SARAH M. MADLOCK,
Plaintiffs-Appellants,
v.
DANIEL ANTHONY, JR.,
Defendant-Appellee.

APPEAL FROM
MUNICIPAL COURT
FIRST MUNICIPAL DISTRICT
OF THE CIRCUIT COURT
COOK COUNTY

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

On March 16, 1962, plaintiffs filed a complaint asking damages of $5,000 for personal injuries and damage to a motor vehicle caused by the alleged negligence and willful and wanton misconduct of the defendant in operating a motor vehicle. The defendant was personally served with a summons on November 7, 1964. On November 10, 1964, defendant filed an appearance and jury demand; and on November 13, 1964, was ordered to file an answer within 10 days. On December 3, 1964, he filed a motion to strike the complaint and dismiss the action on the ground that the undue lapse of time prejudiced him and made it impossible for him to defend as adequately as he could had plaintiffs exercised due diligence. On December 4, 1964, defendant filed an answer denying that the plaintiffs were in the exercise of due care and caution for their own safety, admitting ownership of the vehicle, denying negligence or misconduct and denying that plaintiffs were injured or that the automobile was damaged. On January 15, 1965, the court sustained defendant's motion to strike and dismiss the complaint and entered judgment against the plaintiffs "as in the case of non-suit." Plaintiffs appeal. Defendant has not appeared in this court.

The complaint was filed on March 16, 1962, the summons issued and placed for service with a notation showing defendant's address as 13417 South Harding Avenue, Robbins, Illinois. On April 13, 1962, the summons was returned "not found." Between April 13, 1962 and July 7, 1964, attorneys for the plaintiffs attempted to trace the defendant. On July 7, 1964, an alias summons was issued. Plaintiffs directed the

Sheriff to try to serve the defendant at 5716 South Michigan Avenue, Chicago. This summons was also returned unserved. On October 9, 1964, after further investigation, a second alias summons, noting the defendant's address as 7032 East End Avenue, Chicago, was served on November 7, 1964. The fact that plaintiffs obtained service strongly supports their contention that they exercised reasonable diligence to obtain service. Hahn v. Wiggins, 23 Ill. App.2d 391. Felton v. Coyle, Gen. No. 50317, Filed November 30, 1965, Ill. App. Ct., First District.

We do not think the record supports the contention of the defendant in the trial court that plaintiffs failed to exercise reasonable diligence to obtain service upon him.

Therefore the order of January 15, 1965 is reversed and the cause remanded with directions for further proceedings consistent with these views.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BRYANT, P.J., and LYONS, J., concur.

235 (1)

A

No. M 50395

OAK PARK NATIONAL BANK, Trustee Under Trust No. 1500, by S. K. Stearn, agent,

Plaintiff-Appellee,

v.

RICHARD MONTANELLI, d/b/a MONTANELLI & SONS,

Defendant-Appellant.

EXCHANGE NATIONAL BANK,

Garnishee-Defendant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY FIRST MUNICIPAL DISTRICT.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

The defendant-appellant herein appeals from a judgment entered in favor of the plaintiff for rent. The case was heard by the court without a jury.

The defendant-appellant has appeared in this court and has complied with all statutory requirements and rules of this court. No appearance or brief was filed in this court by the plaintiff appellee. Under such circumstances the judgment may be reversed without a consideration of the cause on its merits. Eichelberger v. Robinson, 333 Ill. App. 579; C.I.T. Corporation v. Blackwell 281 Ill. App. 504; 941 Briar Place Corporation v. Harman 46 Ill App. 2d 1, 196 N.E.2d 498; Ogradney v. Richard J. Daley Mayor 60 Ill. App. 2o 82, 208 N.E.2d 323.

The judgment is reversed.

Judgment reversed.

Schwartz and Dempsey, JJ., concur.

Abstract only.

67 Ill. 2d 235 (2)

50060

RUTH GILLIAM and JAMES GILLIAM, Plaintiffs-Appellees, v. AGAR PACKING CO., INC., and JOHN C. POPP, Defendants-Appellants.	APPEAL FROM THE SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is a personal injury case in which a judgment was rendered on a verdict against the defendant Agar Packing Co., Inc., for $18,000 in favor of Ruth Gilliam and $200 in favor of James Gilliam. The injuries were sustained when the car in which plaintiffs were riding was struck in the rear by a truck driven by John C. Popp, as the agent of Agar. Hertz Corporation, from whom Agar rented the truck, and Popp were joined with Agar as defendants. A verdict was directed in favor of Hertz and judgment rendered thereon, from which no appeal was taken, and Popp was dismissed on motion of plaintiffs at the close of the evidence.

The notice of appeal recites that the appeal is prosecuted from an order denying the post-trial motion for a new trial or in the alternative for a judgment notwithstanding the verdict. Appeals to this court are taken from final judgments and from those intermediate orders for which specific statutory provision is made, not here applicable. We shall nevertheless consider the case on the merits.

The briefs for Agar appear to be principally directed toward the excessiveness of the verdict in favor of Ruth Gilliam, but such error is not charged under Points and Authorities, as required by the rules of this court. First Appellate District Rule 5(2)(k) (Supreme Court Rule 39(1)). The only defense as to

liability is based on the testimony of Popp that as he approached plaintiffs' car, his attention was diverted by a wasp which entered the cab of his truck and that this was the cause of the collision. Extensive damage was done to plaintiffs' car. Ruth Gilliam complained of pains first in her neck and later in her lower back. After one week she returned to her employment as a sewing machine operator, but her efficiency was impaired. Six months after the accident she entered a hospital for tests and possible exploratory and corrective surgery for her lower back. While undergoing preliminary examinations, she was discovered to have active tuberculosis and the tests and surgery were not performed, nor have they yet taken place.

Among the many trial errors charged, Agar contends that it was improper to inform the jury of Ruth Gilliam's tubercular condition. One such reference was made during the opening argument and another during her physician's testimony. On the opening argument her counsel made clear to the jury that he was not contending that the tuberculosis was in any way the result of the accident, and that it was being disclosed to give the jury a full picture of her condition and to explain why the doctors had not proceeded with the treatment. It was important for both parties that this be made clear. There is no merit in the contention that this was error.

Agar also contends that it was error to allow medical testimony concerning the nature and expense of the exploratory and corrective surgery, since no such surgery had taken place nor is it certain to take place. Miller v. National Cabinet Co., 168 N.E.2d 811 (N.Y. 1960), and Winters v. Richerson, 9 Ill. 2d 359, 132 N.E.2d 673, are cited. In the Miller case, a death claim under a workmen's

compensation statute, the court held there was no evidence that occupational exposure to benzene was a cause of leukemia. In the Winters case it was held prejudicial to permit the jury to witness an exhibition of operative techniques where a skeleton and actual surgical instruments were used. In the instant case there was ample testimony that such surgery is customary for the diagnosis and treatment of Ruth Gilliam's condition and that she may undergo such treatment in the future. There was no error in the admission of this testimony.

Agar argues that the court should not have allowed in evidence, after plaintiffs had made their case in chief, a mortality table relating to Ruth Gilliam's life expectancy, and that during the course of the closing arguments the court should not have permitted plaintiffs to introduce hospital bills, identified as exhibits earlier in the trial but not introduced. Failure to introduce those items in the customary sequence was merely an oversight, and in the absence of prejudice to the opposing party it is common practice to permit such minor deviations.

Agar further argues that in the rebuttal portion of the closing arguments, counsel for plaintiffs referred to matters outside the scope of rebuttal. In his portion of the argument, counsel for Agar questioned the existence of X-rays for which medical bills were in evidence and also argued that Ruth Gilliam should be entitled to recover only for one week of lost employment. Her counsel in response referred to testimony of defendant's medical expert that he had used the X-rays in question in making a diagnosis of her condition. Counsel also referred to her loss of eighty-one weeks of employment. Both of those remarks were

within the scope of rebuttal.

Agar makes two contentions which appear in its Points and Authorities as subsections I(c) and I(d), but which appear in its Argument as subsections II(c) and II(d). First, it contends that it was prejudicial to permit a police officer who investigated the accident to testify that Popp, the driver of Agar's truck, had refused to give a statement. Second, it contends that a physician testifying on behalf of Ruth Gilliam should not have been permitted over objection to testify to the outstanding professional credentials of another physician with whom the witness was associated in practice. These were errors which should not have been made by an experienced lawyer, but they do not warrant reversal.

Agar further contends that the court should not have dismissed the driver Popp as a defendant because only an oral motion for dismissal was made by plaintiffs, without the requisite statutory procedures. (Section 52(1), Civil Practice Act, Ill. Rev. Stat., ch. 110, § 52(1) (1963)) and because the dismissal prejudiced it (Agar). The primary purpose of Section 52 is to protect the defendant whose dismissal is sought, not other defendants who happen to be in the case. See McCaskill, Illinois Civil Practice Act Ann. 129-130 (1933). Agar's counsel also represented the defendant Popp. We are at a loss to understand why counsel resisted a motion which under the circumstances could only benefit his client Popp. Popp himself made no objection, and defendant Agar was not harmed in any respect of which we may take notice. We note that Agar filed its post-trial motion in its own name only, but its Notice of Appeal was on behalf of both itself and Popp. There was no judgment against Popp, and Agar cannot make him a party to

this appeal simply by placing his name on the Notice of Appeal.

Agar cites as error the refusal of the court to give an instruction setting forth its theory that this was an unavoidable accident caused by a wasp which was not legally responsible. While Agar was entitled to have its theory of lack of negligence presented to the jury, instructions using the term "unavoidable accident" are disfavored. The following comment is contained in Illinois Pattern Instructions, § 12.03:

> "Laymen do not have an understanding of this technical meaning of 'accident,' but understand it to mean any occurrence producing injury not implying deliberate or intentional fault. Used in this sense, of course, a jury can only be misled when informed that a defendant is not responsible for the consequences of an 'accident.' This is true even though 'accident' is ostensibly qualified by the term 'unavoidable.'"

Agar's theory was given in general terms by instructions which set forth that this defendant denied it was guilty of negligence and which defined negligence in terms of reasonableness and ordinary care.

Finally, defendant Agar contends it should have been permitted to amend its answer to include unavoidable accident as an affirmative defense. Popp testified to the facts on which this defense is based and the jury had the issue before it. There is no basis for granting a new trial.

The judgment is affirmed.

Judgment affirmed.

Sullivan, P.J., and Dempsey, J., concur.

Abstract only.

50878

EDWARD LEPPA and ANNE LEPPA, Plaintiffs-Respondents,	)	APPEAL FROM
	)	CIRCUIT COURT OF
v.	)	
	)	COOK COUNTY,
MANUEL GOMEZ and TAMELING BROS. CARTAGE, INC., a corporation, Defendants-Petitioners.	)	COUNTY DIVISION.

MR. PRESIDING JUSTICE DRUCKER DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action based upon negligence to recover the damages which were incurred by them as a result of a collision between their automobile and a truck owned by Tameling Bros. Cartage, Inc., and driven by Gomez. A judgment in favor of the defendants was entered upon verdicts returned by the jury against each of the plaintiffs. Plaintiffs' motion for a new trial on the sole ground that the verdicts were against the manifest weight of the evidence was granted and a new trial was ordered by the trial court. The defendants filed a petition for leave to appeal from that order but plaintiffs filed no answer. Leave was granted and defendants' petition stood as their brief, in accordance with Rule 30 of the Supreme Court. (Ill. Rev. Stat., 1963, ch. 110, § 101.30.) Plaintiffs filed no briefs.

Edward Leppa testified that between 5:00 P.M. and 6:00 P.M. on December 13, 1960, his wife, Anne, was a passenger in his automobile which he was driving south on Canal Street north of 22nd Street in Chicago, Illinois; that there are two lanes for southbound traffic on Canal in addition to one lane for parked cars, that he stopped for a red light and noticed that there were three cars parked to his right while defendants' truck was stopped next to him in the lane to his left. Leppa further testified that:

> When I noticed the car ahead of me proceed this truck pulled out just shortly before I did and I just followed the car ahead of me and the next thing I knew I was jerked to the right. I went straight ahead, south, following the flow of traffic. I can't say how the collision occurred. All I know, he was to my left.

> I noticed the car ahead of me proceed forward and the truck and I started to proceed and the next thing I knew there was a crash and I was jerked to the right. I know the back of my car was struck, the left rear . . . .

Anne Leppa testified that:

> On December 13, 1960, we were involved in an accident. I couldn't tell you how it happened because it happened so fast and unexpectedly. The only thing I remember, I said "Oh, my back" and that's it.
>
> * * *
>
> I was talking to my husband and I just didn't pay too much attention to anything else.

No other evidence relating to the cause of the accident was adduced by the plaintiff.

On behalf of the defendants, a witness to the accident, Michael Harvey, testified that the plaintiffs' automobile turned into the side of the truck. The witness also acknowledged his handwritten statement which stated that:

> [T]he semi [refering to defendants' truck] started moving at the same time a car ahead of me, a 1957 Pontiac [plaintiffs' car] in the middle lane of traffic tried to switch lanes from the middle lane to the left lane. While doing so the left front of the Pontiac struck the right front fender of the semi and the Pontiac swung back in the middle lane and subsequently its rear end swung into the rear end of the semi . . . .

Though a trial judge has broad discretionary power to order a new trial a court of review will not hesitate to reverse that order where the judge has abused his discretion. Stobbs v. Cumby 9 Ill. App. 2d 138. Plaintiffs introduced no evidence that the defendants were negligent. They both testified that they didn't know how the collision occurred. The verdicts of the jury could not have been against the manifest weight of the evidence since there was no evidence as to the defendants' negligence. The order of the trial judge constituted a clear abuse of discretion. Therefore the order

of the trial court granting a new trial is reversed and the cause remanded with directions to set aside the order granting a new trial and to re-enter judgment on the verdicts in favor of the defendants.

REVERSED AND REMANDED
WITH DIRECTIONS.

English, J., and McCormick, J., concur.

Publish abstract only.

Def Feb 4

Abs V67 (#1)

67 I.A. 314

NO. 65-65 M

Abstract

A

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	
vs.	)	Appeal from the Circuit Court, Magistrate Division, DuPage County.
ROGER CLARENCE SLAUGHTER,	)	
Defendant-Appellant.	)	

MR. JUSTICE MORAN delivered the opinion of the court.

This is an appeal from the magistrate court of DuPage County. The defendant, Roger Clarence Slaughter, was found guilty of theft following a bench trial and sentenced to one year in the Illinois State Farm at Vandalia, Illinois.

The defendant urges two basic errors from which he feels a reversal is required. For the purpose of this appeal we shall consider his first assignment of error, that is, the complaint upon which he was tried and convicted was fatally defective for not setting forth the necessary elements of the statutory provisions violated.

The original complaint charged "that at or about the hour of 2:40 A.M. on or about the 15th day of January, A. D. 1965 . . . . . Roger Clarence Slaughter . . . . committed the offense of burglary in violation of Section 19-1 of Chapter 38 of the Illinois Revised Statutes of said State . . . . in this, to wit; that said defendant did without authority knowingly enter the premises of 320 S. Westmore, Lombard,

Illinois, known as the Corner Food Store, with the intent to commit, and did commit, a theft therein consisting of cigarettes, United States Coins and United States Postal Stamps . . . ."

Subsequently, on February 16, 1965, approximately one month before trial, the State moved to amend the complaint from the charge of burglary to theft. The clerk's docket reflects the following minute order, "Amend from Ch. 38 Sec. 19-1 to Sec. 16-1 and body after words cigarettes, coins and postal stamps' with a value of less than $150.00!"

Thereafter, a trial on the amended complaint was had and the defendant was found guilty as charged. Post trial motions for a new trial, arrest of judgment and to quash the complaint were all denied by the court.

It is well settled law that an indictment, information or complaint charging a crime in the words of the statute or in verbiage which sets forth the nature and elements of the offense as defined by the statute is sufficient. People v Edward Martin, 62 Ill. App. 2d 97, 101; People v Smith, 57 Ill. App. 2d 74, 80. The original complaint herein followed the words of the statute for the crime of burglary; however, upon amendment, the question becomes, did the complaint, since it was not in the words of the statute for the offense of theft, sufficiently express the necessary elements of that crime?

Chapter 38, Section 16-1 of the Illinois Revised Statutes (1963) describes what constitutes the crime of theft. A person is guilty of such an offense when he "knowingly" commits any one of the four listed acts while in any one of the three listed mental states. The particular act and mental state must coincide. See Drafting Committee Comments, S.H.A., Ch. 38, Sec. 16-1, also People v Jackson, Number 49990, First Dist., _____ Ill. App. 2d ____.

The four acts enumerated have one common denominator, that is, the obtaining control over property. The method of obtaining control is the

67 I.A. 2 327

adv V67 #1

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 10667 Agenda No. 3

Reba N. Corray,
Plaintiff-Appellee

vs.

Frank M. Corray,
Defendant-Appellant

Appeal from
Circuit Court
Champaign County

TRAPP, P. J.

Defendant appeals from an order entered upon his petition for clarification of an order which modified the terms and provisions of a property settlement incorporated into a decree of divorce.

The agreement, dated September 18, 1950, was drafted and incorporated into a decree entered September 20, 1950. The provisions of the decree relevant to the issue raised include the following: (1) the residence of the parties, title to which was held in joint tenancy, was to be occupied by the wife rent free until her re-marriage, with incidental provisions for the maintenance of the improvements and agreement that neither should encumber or permit liens to be placed upon the property, with the provision that there might

be a private sale by agreement of the parties: (1) the defendant was to pay $1500.00 cash to the wife and the sum of $150.00 per month as alimony, and the further sum of $50.00 per month for a minor with incidental limitations upon the latter payment: and (3) that the plaintiff wife was to be made primary beneficiary of two insurance policies having a face value of $5000.00. the defendant to pay the premiums and not to borrow or obligate the policies so long as the wife should not re-marry, but upon her death or re-marriage. the husband had certain rights to change the primary beneficiary.

In 1960, defendant filed a petition praying the modification of the decree alleging a material decrease of his income and ability to pay. with a schedule purporting to show amounts, including the premiums of the life insurance policies paid in behalf of the plaintiff, in a total sum in excess of his net income, and praying the modification of the decree, "...so as to do equity to both of the parties hereto...". There was neither allegation nor prayer requesting the court to alter the rights of plaintiff as beneficiary of the insurance policies.

The order entered upon such petition recites that the plaintiff did not file an answer or other pleading directed to the said petition, and we are unable to determine from the record to what extent the modification hereinafter set

forth was the result of negotiation and agreement. Appellant's statement in his brief is that no evidence was heard as a part of the proceedings.

The order modifying the decree is that the defendant should convey, by good and sufficient warranty deed, his undivided one-half interest to the plaintiff in the real estate held in joint tenancy, and that the defendant shall pay the sum of $62.50 per month to plaintiff for her life, or until her re-marriage:

> "....in full settlement and in discharge of all of his obligations for the support and maintenance of..... and in full settlement and discharge of all payments of every kind and nature provided to be paid by the said FRANK M. CORRAY to REBA N. CORRAY or on her behalf....".

with certain other provisions not in issue. The order concluded:

> " (e) That both of the parties hereto are forever barred from petitioning this Court, or any other court, for an increase or decrease of payments herein provided to be made."

In 1964 defendant filed a "petition for clarification of the order modifying the decree of divorce", alleging his performance of all of the terms of the decree of 1960, and that a controversy exists as to whether or not the defendant had the right, power and privilege to change the beneficiary of the insurance policies, and further alleging a controversy as to whether or not the defendant was relieved from making

the payment of the premiums on the said policies, and requesting that the court clarify the order of 1960 upon such questions.

The answer of the plaintiff to the petition alleges that the court is without jurisdiction to modify the order of 1960, and contends that the plaintiff had certain vested rights in the insurance policies, that the modifying order in 1960 was prepared by defendant's counsel and that there was then, and is now, no ambiguity within said order. The trial court entered an order upon said petition on the 19th day of March, 1965, finding that the court had jurisdiction of the subject matter and of the parties, and that the effect of the order entered in 1960 was to relieve the defendant of the obligation of paying the premiums upon the insurance policies in issue, but that the defendant did not have the right to change the primary beneficiary of the policies or to borrow on or otherwise obligate such policies, and that the plaintiff's rights as primary beneficiary of the policies was governed by the property settlement incorporated into the original decree.

The trial court prepared a memorandum of his conclusions upon the issues presented in which he stated that there is no language in the order of 1960 that makes any change in the status of the plaintiff as beneficiary, and that in so far as the insurance policies were concerned, the only effect of the order of 1960 was to relieve the defendant

of the obligation to pay insurance premiums. It seems apparent from a review of the petition filed in 1960, that the only thing specifically referred to by the defendant, as petitioner, was the diminution of his income and the burden beyond his then capacity to make the periodic payments for the benefit of his wife. To meet this change of circumstance, the conveyance of the one-half interest in real estate was correlated with the reduction of monthly payments of alimony from $150.00 per month to $62.50 per month. The modifying order was phrased in language indicating the discharge of defendant's:

> "....obligations for support and maintenance...and in full settlement and discharge of all payments of every kind and nature provided to be paid...."

In so far as it appears from the language of the petition and the modifying order of 1960, there was no reference to altering the parties' agreement in its disposition of the interests as beneficiary in the insurance policies. All language that we can find relates to the making of payments in support and maintenance of the plaintiff and we find neither request for, nor any order, making change as to other aspects of the settlement.

The clarifying order entered in March, 1965, finds that defendant is relieved of making any payment of the premium upon the policies in question. Having in mind the nature of the issue as determined from the petition filed by the

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. M-10660 Agenda No. -

People of the State of Illinois,
Plaintiff-Appellee

vs.

Anthony Brooks,
Defendant-Appellant

Appeal from
Circuit Court
Sangamon County

TRAPP, J.

Defendant appeals from an order entered in the Magistrate's Division of the Circuit Court of Sangamon County revoking his probation granted theretofore under an order entered May 26, 1964, upon a plea of guilty of a charge of selling fireworks illegally.

On July 30, 1964, a petition to revoke such probation was filed in the court of the same magistrate charging that on July 4, 1964, the defendant sold firecrackers of the type defined in §127, and that such sale was in violation of §128 of chap.127½ (Ill. Rev. Stat., 1963), an Act regulating fireworks. The petition further charged that on the said date the defendant committed the offense of resisting a peace

officer in violation of Chap.38, §31-1 (Ill. Rev. Stat., 1963). This appeal is from the order revoking such probation entered on March 31, 1965.

The order which granted probation included the condition:

> " That the defendant shall not sell any type of "fireworks" as defined by section 127 of Chapter 127½, Illinois Revised Statutes, 1963."

The order of the magistrate revoking defendant's probation found that he had violated one of the terms provided in that he did, on July 3 and July [illegible] the sale" of fireworks, an action which was specifically prohibited by the probation order. The court made no finding upon the charge of resisting a peace officer.

Upon appeal, defendant urges reversal upon the several grounds that the magistrate erred in (1) denying a motion to postpone the hearing upon the petition to revoke [illegible] until the jury trial demanded was had upon the charge following the arrest on July 4, 1964, (2) in denying a motion for a change of venue from the magistrate granting probation to a circuit court judge and (3) that the evidence heard before the magistrate was not sufficient to prove the violation of probation. In the brief and argument, the latter point is somewhat expanded so that it is contended that the evidence shows that the defendant did not sell firecrackers and that

the:

> ".....involvement of the defendant in the affair .... was brought about, by a scheme of 'entrapment' on the part of the police officers and their accomplice."

It is further argued that an arrest and search was made without a search warrant as required by Statute, Chap.127½, §130 (Ill. Rev. Stat., 1963), being an Act to regulate the selling of fireworks.

Upon the contention that the magistrate erred in refusing to continue the hearing on probation until there had been a jury trial upon the charge of selling fireworks on July 4, 1964, thus depriving the defendant of a constitutional right to a trial by jury, it seems to be settled in this State that one charged with violation of probation is not entitled to trial by jury, nor must he be proven guilty beyond a reasonable doubt in determining whether or not the probation has been violated. People v. Price, 24 Ill. App. 2d 364 at page 373; 164 N. E.2d 528. The issue raised here was decided contrary to defendant's contention in People v. Kostaken, 16 Ill. App.2d 395; 148 N. E.2d 615, where the trial court was affirmed when it refused a demand for trial upon the indictment and entered an order revoking probation upon evidence concerning the matters set out in the indictment. This was true despite the fact that following the revocation of probation, the indictment for robbery was dismissed.

Considering the alleged error in refusing to grant a change of venue from the magistrate who had granted probation, to a judge of the circuit court, we find, from the record, that hearing for revocation of probation had been set by agreement of the parties. Upon the date of hearing, defendant's counsel moved for a continuance as discussed above. Upon denial of a continuance he then moved orally for a change of venue. In a colloquy with the court, defendant's counsel stated that he thought that the magistrate who had granted probation was as fair as any, but that the magistrates deal directly with the police who were considered to be particularly interested in the case, and that the defendant wanted a judge who was familiar with the defense of entrapment and other points relating to constitutional rights. The written motion filed subsequently to this colloquy includes the language:

> " That he does not believe that he will receive a fair and impartial hearing in the matter of the petition to revoke probation heretofore granted by the circuit court, if said hearing is held in the magistrate's court."

The record discloses, however, that the order of granting probation was signed by the magistrate before whom the petition to revoke probation was then pending.

The Statute providing for a change of venue in criminal cases, Chap.146, §18, (Ill. Rev. Stat., 1963),

provides that a change of venue may be sought:

"....in an indictment or information...."

The Statute relating to probation proceedings, Chap. 38, sec. 117-3, (Ill. Rev. Stat., 1963), provides that a petition for revocation shall be presented to the court which admitted the person to probation. Within the section of the Criminal Code dealing with the granting of probation, and particularly the proceedings in revocation, there are no specific provisions with regard to change of venue and the rights, therefore, must be determined under the provisions of the Venue Act.

In the latter Act, sec. 18 and 21 provide that there may be application for a change of venue when the defendant feels he cannot receive a fair and impartial trial because of the prejudice of the judge against the defendant or his attorney. The language relates the fair trial to the prejudice of the judge hearing the matter and not to the court. We do not believe that the position of the defendant upon this question comes within the language of the Statute.

Again, sec. 24 of the Venue Act provides, in substance, that no application for change of venue made more than 30 days after the earliest date at which defendant might have been heard:

> " ...shall be allowed unless the applicant shall have given to the State's Attorney at least ten days previous notice of his intention to make such application, ...".

Here the motion was made after the matter was in hearing, and apparently as an alternative motion when the motion for continuance had been denied.

We conclude, therefore, that the magistrate did not err in denying the motion for a change of venue.

The chain of events leading to defendant's arrest is described in highly conflicting testimony. The initiating force is found in the person of one Scattergood, an acquaintance and occasional customer of the defendant. The keystone in defendant's position is that he did not sell firecrackers at retail so that he did not violate the Act regulating the sale of fireworks. His account, in summary, is that about dark on the evening of July 3rd, Scattergood came into his market and during the conversation asked to purchase some firecrackers, to which defendant replied that he was not handling them as he was on probation and that he did not have any. Defendant testified that being asked if he knew where Scattergood could get some, he told him of a boy who had been to Arkansas and brought some firecrackers back and that he told Scattergood that if the boy came in he would ask him if he would let Scattergood have some. He further testified that Scattergood returned to the store on the 4th of July, that the boy had come in and left a package and asked the defendant to collect $10.40; that the firecrackers were wrapped in a package which he did not open. He testified

that Scattergood returned in the evening of July 4th and asked, "Did you see the boy?", to which defendant replied that he left a package and told the defendant to collect $10.40 for it. Scattergood insisted that he only wanted two or three dollars worth of firecrackers, to which defendant replied that the boy had left the package and that Scattergood could take it or leave it, as he would not break the package and sell firecrackers. He further testified that Scattergood said he would go home and see if he had enough money, and defendant threw the firecrackers into the drawer; that Scattergood returned in 15 or 20 minutes and said that he would take the package and gave defendant $10.40, which he put in his wallet; that shortly thereafter Scattergood returned with the police who asked for the rest of the firecrackers. Defendant denied having any firecrackers and denied having just sold any, at which a police officer advised defendant that he was under arrest and started searching the premises. Defendant testified that he then cussed the officers who ultimately put handcuffs on him and that when he persisted in saying that he had no firecrackers, they took off his belt to bind his feet; that when the officers asked to see his wallet to search for the money involved, he asked to see their search warrant; that he was thrown or knocked to the floor and the police started hitting him with a blackjack, and that he was

given a severe kick when he persisted in denying that he had firecrackers; that he was kicked a dozen times in the back, ribs and the shoulders, and that he was hit on the head with a blackjack every time he made such denial. He testified that the police continued to hit him until his wife arrived, apparently at about quarter of six, and that he told her to get hold of his attorney.

The testimony of Scattergood is, in substance, that he went to the market at about 4:30 on the evening of July 4th, he asked defendant if he had firecrackers and that he was told by the clerks that they were not selling firecrackers in single packages any more but that he would have to buy a bundle, that was $10.00; that he told defendant that they were too high and he left and called the police department and that in 10 or 15 minutes officers Olshefsky and Goin came to his home and asked if he could go over to purchase firecrackers; that he, Scattergood, took two $5.00 bills from his pocket which the officers initialed, that he drove his car to the market accompanied by a boy, Michael Emmons, and that the police officers followed in their car and parked about half a block from the market. It had been agreed that the police officers would wait outside the store and that when he came out of the store he would hold the package by the side of his leg.

Scattergood then went into the store, Brooks gave him the bundle of firecrackers and took the two $5.00 dollar bills which he laid on the counter; that he returned with the police officers into the store where they asked Brooks about selling firecrackers and the latter was placed under arrest.

Scattergood, upon cross-examination, denied that he had asked Brooks for firecrackers on the evening of July 3rd or on any other day prior to the time that he went into the store in the late afternoon of July 4th.

The defendant's testimony as to the transaction is corroborated in some degree by one Michael Emmons, a lad of some 15 years, who testified that he accompanied Scattergood into the market on the evening of July 3rd and that Scattergood and the defendant had some conversation while he, Emmons, was looking at fireworks permitted to be sold under the Statute, but that he did not hear the conversation between the two. He testified that later that evening while he and Scattergood were out fishing, Scattergood told him that Brooks had said that he would try to get some firecrackers for Scattergood. The defendant's testimony is further corroborated by one Ernest Jenkins, who testified in behalf of the defendant that he had asked Brooks for some firecrackers on July 3rd and had been told by the latter that he was not selling

any. The witness arrived at the store while the search was in progress and recalled the event because he had felt surprised at being told that the defendant had sold firecrackers. The defendant is further corroborated to the extent that an intensive search by the police failed to produce any firecrackers other than those referred to.

It appears that the magistrate considered the details of this evidence with some care, for, as noted, he found that the defendant did "negotiate the sale" of firecrackers on July 3rd and 4th, and that such transaction was a violation of the specific provision in the order of probation, which has been set out in this opinion.

Whether or not the defendant might be found guilty of a violation of the Statute regulating the sale of firecrackers upon a jury trial is not precisely the issue in this matter. The magistrate who granted the probation and drafted the specific condition of probation which has been cited, considered that there had been a violation of the Act. The condition of probation imposed does not require a conviction of a violation of the Statute regulating the sale of fireworks. The fact that Scattergood was a customer or an acquaintance of the defendant neither broadens nor narrows the condition imposed by the magistrate, and bearing in mind the broad discretion of the judicial officer in granting or revoking probation, we do not believe that there was an abuse

of discretion in this case.

Considering defendant's contention that the arrest and search of the premises was illegal in that it was made without a search warrant, it seems to be the position of the defendant that the provisions of Chap.127½, §130 (Ill. Rev. Stat., 1963), specifically require a search warrant. It seems to be the further view that arrest under the provisions of the Act is illegal absent a search warrant. This view must be denied upon examination of the Statute and its history. At the time the Statute regulating the sale of fireworks was adopted in 1941, it was designated as a part of the Criminal Code, Chap.38, §276.30 (Ill. Rev. Stat.). The then Criminal Code, Chap.38, §691 and 692, limited the issuance of search warrants to stolen goods or items expressly specified by statute. Thus the Statute adopted logically required the provision for search warrant if its enforcement was to include searches. The Code of Criminal Procedure, effective January 1, 1964, in its provisions for the issuance of search warrants, does not specify the items or things for which search warrant may be issued. As an incident to the adoption of such Code of Criminal Procedure, the Act regulating the sale of fireworks was transferred to Chap.127½ (Ill. Rev. Stat.) in toto, and it appears that the provision for search warrant, although probably no longer required, was not changed or eliminated. The fact that following the transfer from the

Criminal Code to the present chapter and sections of the Revised Statute, the provision for search warrants was not eliminated, does not require the construction that the effect of the present Act prohibits arrest without a warrant or searches without a warrant for violations of the Act.

It is the argument of the defendant that his arrest without a search warrant was in violation of his constitutional rights. Our Statute provides that a peace officer may arrest when:

> " He has reasonable grounds to believe that the person is committing or has committed an offense". Chap. 38, sec. 107.2 (c), (Ill. Rev. Stat., 1963).

Our Supreme Court has had many occasions to review the "reasonable grounds" authorizing an arrest without a search warrant. The court has recognized the factor that a peace officer is "dealing in probabilities". People v. La Bostrie, 14 Ill. 2d 617; 153 N.E. 2d 570, and People v. Fiorito, 19 Ill. 2d 246; 166 N.E. 2d 606. It appears to be the conclusion of that court that an arrest without a warrant is authorized when the officer is possessed of sufficient facts to influence a prudent man to the belief that an offense has been committed. In this case the informant advised of the possible sale of firecrackers and the officers proceeded to meet the informant and marked the pieces of currency which were taken immediately to the defendant, who returned promptly

from the defendant's store with the bundle of firecrackers. It was after this evidence of an offense that the arrest was made and such arrest thus comes within the rule of People v. Durr, 28 Ill. 2d 308; 192 N.E. 2d 379, and also within the view expressed in the dissent of Mr. Justice Schaefer. It is the defendant's own evidence that he suggested the steps in the transaction whereby the firecrackers were procured and delivered to Scattergood.

The Criminal Code, chap. 38, sec. 108.1(d), (Ill. Rev. Stat., 1963), provides that when a lawful arrest is effected, the officer may reasonably search the person arrested and the area within the latter's immediate presence for the purpose of discovering articles which may have been used in the commission of the offense, or constitutes evidence thereof. Under the circumstances of this case we believe that the arrest and search of the defendant and his premises was lawful.

The defendant argues that, under the circumstances in evidence, the defendant was the victim of entrapment and that it is against the public policy of the State, stated in Love v. The People, 160 Ill. 501, as being more dangerous to the welfare of society than the crimes to be detected and the criminals to be arrested, (p. 505). Our courts have held that an arrest using some technique of entrapment should be reversed. People v. Beach, 266 Ill. App. 272; People v. Steim, 258 Ill. App. 447. In the former case, a prosecution

for violation of the Medical Practices Act, an investigator gave false symptoms and solicited treatment. The court, in reversing, concluded that the defendant had been urged and persuaded by the false pretenses and stated that the officer must not plan the crime, or through inducement or solicitation, procure the commission of the offense. In the latter case, an informant, at the request of the sheriff, sought out his friend, the defendant, and induced the latter to help the informant raise money said to be urgently needed by the friend through the sale of liquor in violation of the then Prohibition Law. The conviction was reversed as being an injustice under the methods employed. The court noted that the defendant had never, theretofore, been convicted of a prohibition offense and this was considered as an evidence of a want of intent of the defendant to commit an offense. However, it has been held that a request by one working with the police for the unlawful sale of an item does not make the defense of entrapment available. Roberts v. Illinois Liquor Control Commission, 58 Ill. App.2d 171, p. 179; 206 N. E.2d 799.

We find no evidence that Scattergood engaged in this transaction at the instigation of the police. The testimony from the latter would appear to indicate that they knew nothing of the matter until they received Scattergood's

telephone call at about 5:00 P. M. on July 4th. The testimony of the defendant does not disclose anything more than Scattergood's query as to where he might get some firecrackers. We find no urging of the defendant by Scattergood upon the basis of friendship or otherwise, but rather the arrangements for procuring the firecrackers seems to have been suggested by the defendant. City of Evanston v. Myers, 172 Ill. 266; 50 N. E. 204.

In the authorities noted upon the doctrine of entrapment, the opinions disclose evidence that the offense had been planned and induced by the peace officers or prosecuting officials. We cannot find any testimony in this record disclosing such circumstances and accordingly, the argument from inference only cannot be accepted to cause this court to hold that the arrest was against public policy.

It has been argued at some length that the police indulged in brutality of high degree. At the time of the original argument, the members of the court felt a high degree of concern with regard to the matters argued, and the record has been examined with care. The evidence is that the defendant was promptly advised that he was under arrest, but the officers testified that it was necessary to call two additional officers to the place to subdue and handcuff him and that it was necessary to restrain his feet and cause him to lie on the floor. The testimony of the defendant himself

indicates that he felt that he should not be arrested without a warrant. The testimony of the witness, Emmons, and the witness, Scattergood, reflect that, until restrained, the defendant was waving his arms, and while not actually striking blows, would not submit to arrest.

The defendant's testimony is that from the time he was restrained throughout the period of the search of the premises until his wife arrived at 5:45 P. M., he was continuously beaten with a blackjack and kicked a dozen or more times. The evidence is that he "passed out" and was taken to a hospital where he remained for 3 or 4 days.

The officers denied striking or kicking the defendant, and the witness, Emmons, who was in the building and at the door, heard no sounds of blows or kicks. While there is evidence that the defendant received a cut on his forehead during the struggle with the officers, there is no testimony from any source other than the defendant as to the blows or the kicking; there is no evidence from medical records or the testimony of the doctors or nurses who treated the defendant at the hospital concerning injuries as claimed by the defendant. The testimony of the defendant's wife is that she did not go to see him while he was in the hospital, and neither of them have testified as to even inquiring of the doctor as to the nature of the injuries sustained, or for

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General No. 10687 Agenda No. 11

STATE OF ILLINOIS

IN THE APPELLATE COURT

FOURTH DISTRICT

Evelyn Edwards, Plaintiff-Appellant vs. Robert Holcomb, Defendant-Appellee	Appeal from Circuit Court Pike County

Smith, J.:

Plaintiff filed her suit seeking an accounting and a dissolution of a grocery-business partnership allegedly acquired and operated by her and her husband during marriage. Defendant husband filed a motion to dismiss to which he attached copies of the divorce decree and two supplemental decrees which he says establishes his ownership of the grocery business. Defendant's motion to dismiss was allowed and a decree finding the plaintiff without right or interest in the business was entered. Of this action, she now complains.

Plaintiff filed her suit for divorce charging cruelty and alleged:

> "6. The defendant owns and operates a general store in Pleasant Hill, Illinois, and is well able to support his wife and children.
>
> "7. The parties hereto jointly own certain real and personal estate...."

In her prayer for relief, the plaintiff asked that "the rights of the parties in jointly-owned real and personal property be settled and determined". The defendant answered admitting the allegations in ¶ 6 and ¶ 7 quoted above and filed a cross complaint for divorce on the grounds of adultery. The decree was granted to the husband on his cross complaint; custody of the 12 year old son and 7 year old daughter was awarded to him; and "this cause - retained on the docket for determining a property settlement of the parties". This decree was entered August 6, 1964. On October 8, 1964, the decree was modified by spelling out in detail the visitation rights of the mother. On October 30, a supplemental decree provides that "the matter of property settlement having been continued", it is ordered that husband convey the 1958 Buick automobile to the wife; that husband live in the property owned by the husband and wife so long as any of the children live at home with him; that he should pay taxes, upkeep, and payments on encumbrances, and at the end of his right to occupy the property, the property should be sold and the proceeds equally divided after

allowing him proper credit for payments on existing encumbrances; that she have as her own property certain enumerated items of household goods and that the remainder stay in the house as the property of the husband. No specific mention is made of the business in any decree.

Defendant contends that the divorce suit is conclusive of the ownership of the grocery business either by reason of res judicata or estoppel by decree. Plaintiff justifies her present suit on the theory that the ownership of the business was not an issue in that suit; the divorce decree and its supplements were silent on the subject; and thus she is free to litigate the question in this suit. It is true that the ownership was neither contested, litigated nor specifically decided in the divorce suit. In her divorce suit, she alleged the ownership in her husband. In his answer, he admitted it. There was no contest - there was nothing to litigate - there was no issue. The first suggestion in this record that the wife has or had any claim, equitable or otherwise, to the business is this suit instituted some four months after the last supplemental decree apparently disposing of the joint property.

It is not unreasonable to assume that plaintiff was fully aware of the facts of ownership when she filed her divorce suit. She either misrepresented those facts to the Court then or she misrepresents them now. She attempts a bit

of open-field running without a word or syllable in explanation of or justification for reversing her field. She specifically alleged that she and her husband "jointly own certain real and personal property". By so doing, she brought into the divorce suit the issue of partnership property, if one existed. It seems to be well settled that each partner is possessed of a joint interest in the whole, but does not own any separate part of the partnership property. Swirsky v. Horwich et al., 382 Ill. 468, 47 N.E. 2d 452; Cook v. Lauten, 1 Ill. App. 2d 255, 117 N.E. 2d 414. By alleging in ¶ 6 that her husband owned and operated a general store in Pleasant Hill, Illinois, she specifically negatives any thought that the business was either jointly owned or partnership property. By admitting the allegation, her husband agreed to it. There is no higher proof that a fact exists than a stipulation to, or an agreement of its existence. This they did by their pleadings and conduct in the divorce suit.

In the judgment order in this suit, the Court specifically took judicial notice of the records, files, and orders in the divorce suit and found that the plaintiff had no interest in the business property. We perceive no error in this conclusion. In Dryz v. Bol, 19 Ill. App. 2d 406, 153 N.E. 2d 859, the Court reviewed a suit involving trust property where the trial court in a divorce decree did not expressly adjudicate or mention the trust property. A plea of

estoppel by decree was sustained. The court concluded there, as we conclude here, that the parties intended to bring before the court in the divorce suit the disposition of all property in which they both had a possible claim or interest. It was there pointed out that the failure to specifically mention the trust property did not impair the application of the doctrine of estoppel by decree, citing City of Elmhurst v. Kegerreis, 392 Ill. 195, 64 N.E. 2d 450. It seems clear to us that the trial court in the supplemental decree necessarily determined that the business property belonged to the husband and thus gave judicial blessing to the assertions of the parties. That he did not spell this out word by word is not, as we have seen, a bar to equitable estoppel in the instant suit. Plaintiff voluntarily painted the picture as to the business property; neither here nor in the divorce suit did she offer any equitable reasons why she should now be permitted to rub it out.

The decree of the circuit court of Pike County is affirmed.

Affirmed.

Trapp, P.J. and Craven, J. concur.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 10688 Agenda No. 12

Vivian Jane Cardiff and Leon D. Cardiff,
Plaintiffs-Appellants

vs.

Eugene L. Haak,
Defendant-Appellee

Appeal from
Circuit Court
Champaign County

CRAVEN, J.:

This was an action for personal injuries to recover damages suffered by Vivian Jane Cardiff, who was injured in a rear-end automobile accident, and an action by the husband to recover damages for injuries received by his wife.

The facts are that Vivian Jane Cardiff was a passenger in an automobile driven by her father-in-law. They were returning to the Cardiff home from a hospital visit to the plaintiff Leon D. Cardiff. Their car was proceeding east on Springfield Avenue in the city of Champaign when it stopped for a stop light behind several other cars at the intersection with

Wright Street. The defendant Haak was driving east on Springfield Avenue at some twenty to twenty-five miles per hour, having just turned onto Springfield Avenue from another street east of Wright. The defendant testified that he was preoccupied with office matters, did not see the car in which the plaintiff was a passenger, was late in hitting his brakes and struck the rear of the Cardiff car. Mrs. Cardiff, a passenger in the front seat, was thrown forward, her leg was injured, her shoulder was injured and her neck was hurt. The Cardiff car was, according to the testimony, shoved some seven or eight feet forward by the impact. The collision caused damage to the Cardiff car by the breaking of a rear taillight and the bending of the gas tank. The left-front fender and grill of the car driven by Haak were damaged. This latter car was not owned by Haak and he testified that the car did not have power brakes, to which he was accustomed, and that he was embarrassed by the incident. The plaintiff Mrs. Cardiff sought to recover for her injuries, and by his complaint the plaintiff Leon D. Cardiff sought to recover loss of services and earnings of his wife, loss of society, companionship and consortium of his wife, as well as other alleged elements of damage.

The jury returned a verdict for the plaintiff Mrs. Cardiff and fixed her damages in the sum of $600.00. As to the plaintiff Leon D. Cardiff the jury returned a verdict of not guilty on the question of liability. Judgments

were entered upon the verdict, post-trial motions were denied and this appeal follows.

An oral motion for a directed verdict at the close of all the evidence was denied because it was not in writing and because an appropriate instruction was not tendered. This is assigned as error. In view of the determination of liability as to the plaintiff Mrs. Cardiff this alleged error passes into insignificance.

Although there was no directed verdict for the plaintiffs on the question of liability, it is clear, from the brief recitation of the facts, that the only conclusion to be drawn from the evidence is that liability here is uncontroverted. The trial court refused to direct a verdict for the plaintiff on the question of liability for procedural and not substantive reasons, and observed: "I think probably that this is a case of liability as a matter of law. I don't think the jury will see it otherwise either. As far as that goes I don't think anybody is going to contend seriously that it isn't a case of liability. I think the issues are, what are the damages."

This record substantiates that conclusion by the trial court and the conclusion is equally applicable to both plaintiffs. A finding of not guilty as to the plaintiff Leon D. Cardiff is completely without foundation in the evidence and judgment for that plaintiff, notwithstanding the verdict of the jury, should

have been entered as sought in the post-trial motion.

A finding of not guilty is not, as the defendant suggests, equated with a finding of guilty and no damages. There is much controversy in this record as to the damages of both plaintiffs, but since there is no question of liability a finding of not guilty cannot be sustained.

There is much controversy in the evidence as to the nature and the extent of the injuries of the plaintiff Vivian Jane Cardiff. Following the accident, she was taken to the emergency room of the Burnham City Hospital and there examined by a doctor who found that she complained of neck injuries; X-ray examination was negative and there was some, though not much, muscle spasm. The following day she was again examined. Muscle spasm was found on both sides of the neck, some numbness in the right leg, and soreness in the right ankle--areas of ill-being of which the plaintiff had complained on the date of the injury. The doctor recommended a neck collar, which was worn by the patient for some five months, and he prescribed neck traction, diathermy, ultrasonic therapy, which continued for approximately six and one-half months.

Prior to the accident, the evidence is that the plaintiff Vivian Jane Cardiff had complained of bursitis and had comtemplated therapy treatments for this condition. There is controversy in the evidence as to whether all of the ensuing

treatments, over a period of months, were necessitated by the injury. It can be said, however, from the evidence, that the doctor bills (both treating and consulting), the hospital bills, drugs and therapy-treatment expense were at least equal to, or in excess of, the verdict of the jury. Under such circumstances the award of the jury is inadequate. Haizen v. Yellow Cab Co., 41 Ill. App. 2d 330, 190 N.E.2d 514. As is stated in I.L.P. Damages sec. 162, an award cannot be upheld where the plaintiff has been injured, and has also incurred expenses as a result of the injuries, and an award is made for less than the amount of the expenses. Having found the jury's award as to Vivian Jane Cardiff inadequate under the rules applicable thereto, the judgment as to her must be reversed and the cause remanded to the circuit court of Champaign County for a new trial on the question of damages only.

It is clear that the plaintiff Leon D. Cardiff has a cause of action for damages by reason of the injuries received by his wife. Chicago & Milwaukee Elec. R.R. v. Krempel, 116 Ill. App. 253; Monken v. Baltimore & O.R.R., 342 Ill. App. 1, 95 N.E.2d 130. Since, as we have said, a verdict of not guilty cannot be equated with a verdict of guilty and a return of no damages, and since there is no basis in the evidence for a finding of not guilty on the question of liability as to the plaintiff Leon D. Cardiff, judgment should be entered for him notwithstanding the verdict and the cause remanded for a new trial on the question of damages only.

One of the issues as to the question of damages presented by this appeal is the correctness of the trial court in excluding evidence as to the value of "substitute-mother care." Since, upon a retrial of the issue of damages only, the question will recur, it should be determined. The plaintiffs here were the parents of five children whose ages at the time of the accident ranged from one through fourteen years. The children were living with the parents and Mrs. Cardiff employed no household help. The couple had a normal marital relationship. The plaintiff Leon D. Cardiff sought to introduce as an element of his damages the value of what is called "substitute-mother care." This evidence was excluded. We think properly so.

There was an offer of proof, through personnel of a family counseling service, as to the cost of substitute-mother care but no evidence whatsoever that the plaintiff Leon D. Cardiff was required to hire any household help--substitute-mother or otherwise--nor was there any evidence that Leon D. Cardiff became obligated in any way to pay for such services.

We are not unmindful that, in personal injury actions, great latitude is allowed in the introduction of evidence to aid in determining the extent of damages. (I.L.P. Damages sec. 233 and cases there cited.) Evidence should not be received which would invite the jury to speculate on the value of services not shown to have been obtained. (I.L.P. Damages sec. 235.)

For the reasons stated, the judgment of the circuit court of Champaign County must be reversed as to each plaintiff and the cause remanded to that court for further proceedings in accord with the views herein expressed.

Reversed and remanded with directions.

TRAPP, P.J. and SMITH, J., concur.

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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 10689 Agenda No. 2

People of the State of Illinois, Defendant in Error vs. Eliath Chatman, Impleaded, Plaintiff in Error	Error to Circuit Court Vermilion County

CRAVEN, J.:

The defendant was indicted for armed robbery, tried before a jury, convicted and sentenced for a term of not less than three nor more than seven years in the penitentiary. The Supreme Court issued a writ of error and appointed counsel for the defendant. The case was then transferred to this court.

There is testimony in the record by three accomplices which, if believed, establishes the defendant's guilt beyond a reasonable doubt. The question of the credibility of witnesses is a matter for the jury, and while the testimony of accomplices must be considered with caution it may be

of such character as to convince the jury of guilt beyond a reasonable doubt. It is further clear that the testimony of one witness is sufficient to convict. People v. Nicholson, 55 Ill. App. 2d 361, 204 N.E.2d 482.

The cases cited by the defendant, dealing with the uncorroborated testimony of an accomplice (People v. Harvey, 321 Ill. 361, 152 N.E. 147; People v. Maggio, 324 Ill. 516, 155 N.E. 373; and People v. Aiello, 302 Ill. 515, 523, 135 N.E. 62), are readily distinguishable from the facts in this case.

Here the evidence showed that the defendant borrowed a car in Champaign, drove to Danville, Illinois, accompanied by a girl friend and one Davis and Chambers. Upon arriving in Danville they looked for and found a fourth person by the name of Staples, and the four male occupants of the car continued driving around in Danville, having dropped off the girl friend.

Staples undertook the driving of the car with the permission of the defendant. They drove around, looking at stores, and finally parked a short distance from a package liquor store in Danville. Staples remained in the car with the motor running; the other three walked up to the liquor store. Chambers and Davis entered and robbed the clerk at gun point. Defendant did not enter the store. After the robbery, the defendant, Davis and Chambers ran back to the

car, and Staples drove off. While driving from the scene of the robbery Staples wrecked the car. The four occupants fled on foot. The defendant and Chambers were apprehended and arrested, and subsequently Staples and Davis were arrested.

The three accomplices, each of whom had entered pleas of guilty to the charge, though they had not been sentenced, testified that the defendant had planned the robbery and that the defendant had a sawed-off shotgun in the car. Chambers testified that after the car was wrecked and as he was fleeing with the defendant, the defendant asked for and was given money from the robbery by Chambers. This recitation of the facts must lead us to the conclusion that the jury was warranted in returning a verdict of guilty.

Two other errors are urged, one being that the defendant was unduly limited in the scope of the cross-examination of the accomplices. We agree with the rule, as stated by the defendant, that the testimony of an accomplice must be submitted to great suspicion and that the widest latitude should be allowed the defendant in cross-examining for the purpose of establishing bias. We find no limitation of the right of cross-examination in this record that is violative of the unquestioned rule. On the contrary, the cross-examination of the accomplices, as well as of police officer witnesses, was rather thorough and complete. Such bias or prejudice as may have existed was shown and contradictory prior statements by the accomplices were shown. A careful

review of the record does not indicate a restriction of cross-examination warranting a reversal.

The final error urged by the defendant is that there was prejudice and error in that the trial judge made comments on the evidence, interrupted the examination of witnesses and asked questions of witnesses.

It is, of course, the unquestioned rule that in the trial proceeding the judge should express no opinion concerning the veracity of witnesses, the weight to be given evidence or make remarks relative to the merits of the case. Any examination of witnesses by the court must be considered in the light of the particular circumstances. The record will not sustain the assertion that the trial judge assumed the role of prosecutor, although he did question Chambers concerning the money obtained in the robbery. Viewed in the light of the record before us, we find the questions of the trial judge of a clarifying, not prosecutive, nature, except the one question to Chambers about the distribution of the money, which was error. The answer obtained from Chambers was, however, only a repetition of evidence in the record from the police officers. We do not feel that such error warrants a reversal. The judgment of the circuit court of Vermilion County is affirmed.

Judgment affirmed.

TRAPP, P.J., and SMITH, J., concur.